IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1596

ANTHONY GRUNDY and
CARL WEAVER . . . . . . Petitioners

versus

MANCHESTER INSURANCE & INDEMNITY
COMPANY . . . . . . Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

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The Respondent respectfully prays that the Petition for Certiorari filed by the Petitioners be summarily denied upon the ground that it fails to set forth a valid reason to review the final order of the Supreme Court of the Commonwealth of Kentucky entered herein on February 6, 1976.

QUESTION PRESENTED

Whether the Supreme Court of the Commonwealth of Kentucky in its final order violated the Petitioners' rights to equal protection of the law and due process as guaranteed by the Fourteenth Amendment to the

Constitution of the United States of America because it ruled that due to the peculiar question and complicated facts involved in the litigation, that it was impracticable for a jury to try the case.

CONSTITUTIONAL PROVISION INVOLVED

The only constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States of America.

COUNTERSTATEMENT OF THE CASE

1. On May 30, 1964, an insured of the Respondent, struck the rear of an automobile being operated by Humphrey. The Humphrey automobile then struck the Petitioner, Grundy, a pedestrian.

2. Grundy sued Weaver. Weaver filed a third party complaint against Humphrey for contribution, alleging Humphrey contributed to bring about the accident.

3. Trial Judge directed a verdict against Weaver in favor of Grundy, but instructed the jury they could find Humphrey contributed to bring about the accident.

4. Grundy demanded the policy limits of $10,000.00. Respondent offered $7,500.00. Grundy offered to take $9,500.00. Respondent refused. Jury awarded Grundy $20,000.00.

5. Grundy sued Respondent alleging it was bad faith on the part of Respondent and its representatives in failing to settle within policy limits.

6. In a jury trial, Grundy and Respondent both offered expert testimony as to their evaluation of the case, and their opinions as to probable amount of a jury verdict.

7. The jury returned a verdict for Grundy for the excess $10,000.00 based upon instructions that had been set forth in a previous decision of the Supreme Court of Kentucky.

8. Respondent appealed. The Supreme Court of Kentucky reversed the judgment and set forth the guidelines to be followed in the retrial of the action. The Court stated that if certain factors were properly weighed and evaluated and properly applied, that a fair test of good or bad faith could be determined, but that a jury was not properly trained to accomplish the task, and ordered that upon retrial, that certain factors and tests be taken into consideration by the trial court in arriving at its decision.

9. A Petition for Rehearing was denied.

REASONS FOR DENYING THE WRIT

1. Rule 39.01 of the Kentucky Rules of Civil Procedure states:

> "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless . . . (3) the court upon motion or of its own initiative finds that because of the peculiar questions involved, or because the action involves complicated accounts, or a great detail of facts, it is impracticable for a jury intelligently to try the case."

Respondent has no quarrel with the authorities cited by the Petitioners in their Petition. However, the Supreme Court of Kentucky pursuant to its Rule 39.01 properly designated this type of case as one involving complicated factors and tests that have to be applied in the context of certain facts, as a case which clearly should be determined by the Court without the intervention of a jury. See *McGuire* v. *Hammond,* Ky., 405 S. W. 2d 191 (1966), and *Hoaglin* v. *Carr's Administratrix,* Ky., 294 S. W. 2d 935 (1956).

The Court, in a thorough, well-reasoned Opinion stated as follows:

> "The difficulty in applying the tests rests in the ability of the fact-finder to apply it. As suggested in the University of Florida Law Review article, this presents a troublesome or even impossible question for the jury. Ordinarily a jury is unsurpassed as a fact-finding body for disputed facts. However, if we assign to the jury tasks which it cannot perform intelligently, we are destroying the efficacy of the propounded test.
>
> This is pointed out in an acticle entitled 'Duty of Liability Insurer to Compromise Litigation,' 26 Ky. L. J. 100, Jan. 1938. The article discusses the tests of 'negligence' and 'bad faith' and goes on to say '(h)ere we have two tests enunciated by the courts. Each has been bitterly attacked by writers and by judges. There is little distinction to be found in some decisions which apparently regard both tests to have the same essential elements. The one real point of vulnerability is existent under both—that is consideration of the question as a jury issue. No jury whatsoever is

> competent to consider such an issue when ever attorneys, experts in the fields of personal injury and insurance law, might well differ upon the questions of due care by or good faith of the insurer in such a situation. A group of laymen, casually assembled, is absolutely incompetent to apply either test accurately * * *.' We are of the opinion that a jury is just not equipped to evaluate the probable chances of recovery in a given case; nor is it equipped to properly weigh and evaluate this factor together with the other factors enumerated above. The issue of 'bad faith' should be decided by the trial court. Only the trial court has the training and experience to properly apply these factors to a set of facts. We thus overrule Marcum, American Surety Co. of N. Y. and Harrod, supra, to the extent that they approve submitting the issue to the jury, and other cases that leave this question to the jury."

2. This Petition is premature. The Supreme Court of Kentucky has not denied the Petitioners equal protection of the law nor has it denied them due process. The Court merely reversed the trial court judgment and ordered a new trial. Upon retrial, the Court set forth the tests and guidelines to be followed by the trial court in arriving at its decision, and *that* decision should be made without the intervention of a jury. How can they *now* predict that they were denied equal protection or due process merely because the Supreme Court of Kentucky ordered the retrial to be handled in a certain manner? Upon retrial, the Petitioner, Grundy, may again prevail and recover the excess judgment.

3. The United States Constitution does not secure a right *per se* to a trial by jury in State proceedings. *Maxwell* v. *Dow,* 176 U. S. 581, 605, 20 S. Ct. 448, 44 L. Ed. 597 (1900). The Supreme Court of Kentucky, in reviewing the record in this case and similar cases, correctly concluded that a jury is not properly trained to intelligently try this type case. The Kentucky Legislature has said in Civil Rule 39.01 that the court has the authority to permit certain cases to be tried without the intervention of a jury. The court has reasoned that justice can best be accomplished in this type of litigation by permitting it to be tried by the trial court.

The Supreme Court of Kentucky stated in *Dryden* v. *Commonwealth,* Ky., 435 S. W. 2d 457 (1968):

> "Certainly we cannot regard a jury as a better, fairer, more accurate fact-finder than a competent and conscientious circuit judge. There may be some judges who do not fit this description, but neither do all juries."

CONCLUSION

For the reasons stated, the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Response to Petition for Writ of Certiorari were this 28 day of June, 1976, mailed to the Hon. Joe G. Leibson, Attorney for Petitioners, at his office located at 515 Marion E. Taylor Building, Louisville, Kentucky 40202.

James Levin

Attorney for Respondent